



U.S. Department of Justice

United States Attorney
Southern District of New York

86 Chambers Street
New York, New York 10007

January 15, 2020

Honorable Ona T. Wang
United States Magistrate Judge
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street
New York, NY 10007

MEMO ENDORSED

**Re: *Kobre & Kim v. Commodity Futures Trading Commission*,
19 Civ. 10151 (LAK) (OTW)**

Dear Judge Wang:

This Office represents the Commodity Futures Trading Commission (“CFTC”), the defendant in this case. We write on behalf of both parties in response to the Court’s November 18, 2019, Initial Case Management Conference Order (Dkt. No. 12), and in anticipation of the initial conference scheduled for January 22, 2020, at 10:00 a.m.

Because Plaintiff brings this action pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), the parties understand Local Civil Rule 16.1 to exempt this case from the mandatory scheduling order requirement contained in Fed. R. Civ. P. 16(b). Accordingly, the parties respectfully request that they be relieved of their obligation to submit a proposed scheduling order, as called for by the Court’s November 18, 2019, Order, as we understand that scheduling order to be designed to fulfill Rule 16(b)’s requirement.

The parties have conferred on the review and production schedule and agreed to proceed with a production schedule whereby the CFTC will make rolling productions of responsive, non-exempt documents, in accordance with search parameters discussed by the parties, along with information regarding the number of documents that have been withheld pursuant to FOIA exemptions and their dates, on a monthly basis and complete its review and production of responsive, non-exempt documents by July 31, 2020. If acceptable to the Court, the parties will submit further status updates every two months, starting March 31, 2020.

As referenced above, with reservation of rights by Plaintiff to seek additional documents after review of the production and privilege/withholding log, the Parties have agreed—on all but one issue—on preliminary search terms, custodians and date ranges for the review. The parties have been unable to agree on the end date of the review period, with the CFTC planning to end the review period on August 19, 2019, and Plaintiff seeking to end the review period on August 21, 2019. Plaintiff seeks the Court’s guidance on whether to submit letter briefing on this one issue or whether the Court wishes to discuss this issue at the January 22, 2020 conference. The CFTC’s position is that, as is typical in FOIA cases, issues concerning the adequacy of the CFTC’s search—along with any issues concerning the CFTC’s withholdings pursuant to any FOIA exemptions—should be resolved on motions for summary judgment after the CFTC has completed its

productions. *See Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 812 (2d Cir. 1994). To the extent the Court can provide guidance on this issue, given the above schedule and preliminary agreements, the Parties are willing to forego the January 22, 2019, conference, at the Court's discretion.

After Plaintiff has received the CFTC's productions and completed its review, the parties will determine whether there are any issues remaining in the case. If the parties are not able to resolve any disputes they may have, they will propose a briefing schedule with respect to the scope of the CFTC's search and/or its application of the FOIA exemptions or for other relief.

We thank the Court for consideration of this matter.

Respectfully submitted,

GEOFFREY S. BERMAN
United States Attorney
for the Southern District of New York

By: /s/ Rachael L. Doud
RACHAEL L. DOUD
Assistant United States Attorney
86 Chambers Street, 3rd Floor
New York, New York 10007
Telephone: (212) 637-3274
E-mail: rachael.doud@usdoj.gov

Counsel for Defendant

Application Granted.

The conference scheduled for January 22, 2020 is adjourned. Parties are to submit joint status updates every two months beginning March 31, 2020. If the parties cannot resolve the issue briefly described in their letter, or any other issues that may arise, they are to submit a letter motion in accordance with the individual practices of the undersigned.

SO ORDERED.



Ona T. Wang
U.S. Magistrate Judge

1/16/2020